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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19	)	
of the Cable Television Consumer	)	
Protection and Cable Act of 1992	)	
	)	
Development of Competition and	)	MM Docket No. 92-265
Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF THE AMERITECH OPERATING COMPANIES

The Ameritech Operating Companies[1] hereby submit these comments in the above-captioned docket. The Notice of Proposed Rulemaking released December 24, 1992, ("NPRM") seeks comments on proposed regulations implementing Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992.[2] These proposed regulations are designed to address concerns related to program access and program carriage.

I. INTRODUCTION

The Companies support the Commission's efforts to ensure that all industry participants have reasonable access to video programming and to minimize what Congress considers to be the anti-competitive impact of the undue market power currently exercised by the existing cable companies.[3]

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[1] The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc., collectively referred to herein as the "Companies."

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. Law No. 102-385, 106 Stat. (1992) (the "1992 Cable Act").

[3] See, Cable Television Consumer Protection Act of 1991, Report of the Senate Committee on Commerce, Science and Transportation Report 102-92, June 28, 1991, at 8-11 (hereafter "Senate Cable Report"). See also, 1992 Cable Act, Finding No. 2.

Despite the well-intentioned efforts of the FCC, however, a new regulatory scheme will not solve the problems in the cable industry. The Companies believe that local exchange company ("LEC") entry into the video content market, is the most effective way to bring to the public the benefits of a fully competitive marketplace. Consequently, we will not present a point-by-point analysis of the proposed regulations.[4] Instead, our comments will focus on general principles that are responsive to the NPRM and are consistent with our position that the FCC and Congress should authorize more competition in the video marketplace.

II. ACCESS TO VIDEO PROGRAMMING SHOULD NOT BE CONTROLLED BY EXISTING CABLE COMPANIES

One of the most compelling factors leading to the enactment of the 1992 Cable Act was Congressional concern with the monopoly-like characteristics of the cable television industry. The increasing horizontal and vertical concentration in the industry was of particular concern.[5] The legislative history indicates that "Concentration has grown dramatically in the cable industry in the last few years."[6] An example of this concentration is that by the end of 1990, the top five cable systems controlled almost half of the nation's cable subscribers.[7]

In addition to this horizontal concentration, Congress was also concerned about the substantial level of vertical integration in the cable industry. The NPRM references data from the National Cable Television Association ("NCTA") showing that 39 of the 68 nationally delivered cable networks have some

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[4] The Companies reserve the right to comment on the specifics of the proposed rules in our reply comments.

[5] See, 1992 Cable Act, Finding No. 4.

[6] Senate Cable Report at 32.

[7] Id.

affiliation with cable operators.[8] Not surprisingly in light of the cable industry structure, Congress found evidence of anticompetitive practices, including coerced exclusive dealing arrangements and other concessions forced on non-affiliated programmers.[9]

Further, Congress concluded from the evidence presented that entrenched cable operators could inhibit the entry of new programmers into the cable industry.[10] The following testimony, citing The Wall Street Journal (May 4, 1988 at 29), is illustrative:

> 'Cable system owners have taken minority equity interest in virtually every new programming channel that has started in the past two years'. As a practical matter, it is almost impossible in the present environment to start a new cable system service without surrendering equity to the owners of the monopoly cable conduits.[11]

This "lock" on programming could impede the development of video dialtone and other alternatives to existing cable television, and Congress appropriately recognized the need to address this problem.

However, instead of implementing an extensive new scheme of regulation directed at the cable industry, the Companies suggest that policymakers open up all facets of the cable television market to competition by all willing players. Policymakers frequently articulate a pro-competitive message, but certain policymakers continue to prohibit LECs from entering the video content

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[8] NPRM at ¶ 2.

[9] Senate Cable Report at 23-28 and Cable Television Consumer Protection and Competition Act of 1992, Committee on Energy and Commerce Report, Report No. 102-628, June 29, 1992, at 42-44 ("House Cable Report").

[10] Senate Cable Report at 24 and House Cable Report at 43.

[11] Senate Cable Report at 24.

marketplace.[12] If LECs were allowed to offer video content, their market entry would provide the checks and balances that Congress is attempting to establish with the 1992 Cable Act.

For example, this docket is being conducted to fulfill a Congressional mandate to address abuses in the procurement of video programming. Specifically, the FCC is seeking comments on Section 628(b) of the 1992 Cable Act, which, inter alia, makes it unlawful for cable operators to engage in "unfair methods of competition or unfair or deceptive acts or practices" that would "hinder significantly" the delivery of programming by multichannel video programming distributors.[13] The most potent remedy against unfair methods of competition practiced against programmers would be the ability of programmers to make their products available through multiple distributors, including video dialtone providers. Alternatives such as this mitigate the possibility of "go with my system exclusively or you don't go anywhere" coercion by entrenched cable providers.

Competition would give video programmers an unprecedented number of market alternatives for their products. This in turn would force balance and fairness into the process of distributing video programming. As detailed in the legislative history of the 1992 Cable Act and adopted as a finding of Congress, the vertical integration of the cable companies gives them the ability to engage in anticompetitive conduct.[14] Until cable companies no longer have such market power, it is appropriate that the Commission adopt rules that will ensure that video programming will be available to all participants in the video marketplace

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[12] See, e.g., House Cable Report at 44

[13] NPRM at ¶ 6.

[14] See, infra at 2-3.

on substantially the same terms and conditions. Without such rules, the video dialtone offerings of LECs will not be successful, and there will only be limited programming diversity.

The refusal to implement competition that would allow the video programming market to operate efficiently substantially limits consumer choice, encourages anticompetitive behavior and stifles development of an advanced infrastructure. Nonetheless, until competition replaces regulation, programming access rules that will encourage at least some competition in the video programming market by ensuring equal access to video programming are appropriate.

III. THE ATTRIBUTION RULES SHOULD BE THE SAME FOR ALL PARTICIPANTS IN THE BROADCAST/VIDEO INDUSTRY

The NPRM seeks comment on the threshold at which an ownership interest should be considered "attributable" for purposes of defining vertical integration of a cable operation.[15] In the Video Dialtone Order, the Commission adopted 5% of the outstanding voting stock as the maximum ownership level for purposes of the telephone company/cable cross-ownership rules and declined to adopt the single majority shareholder rule for telephone company/cable affiliations.[16]

The basic broadcast/cable television ownership rules also allow joint ownership, but also include the single majority shareholder rule.[17] Currently,

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[15] NPRM at ¶ 9.

[16] In the Matter of Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, FCC 92-327 (released August 14, 1992) ("Video Dialtone Order") at ¶ 32-36.

[17] See, 47 C.F.R. Section 73.3555 Note 2(b).

there are no regulatory limits on affiliations between cable companies and video programmers. Thus, there are three sets of inconsistent rules for essentially the same circumstances. The evolution of the cable television industry and technological advances no longer justify this regulatory quagmire.

Cable companies with vast market power in the cable television industry should not have unfettered freedom to own -- for their exclusive use in many cases -- the most desirable video programmers, while LECs and other potential multichannel video programmer distributors are denied the same opportunities. The rules throughout the industry should be the same, since the services are essentially the same. Different rules will only serve to enhance the competitive advantage of cable companies over that of new entrants.

The goal of the Commission here should be to minimize anticompetitive practices. This can be done by imposing on all parties the same rules that are currently applicable to broadcast affiliations. The Commission undermines its purported goals of fostering diversity of video programming sources and increasing competition in the video marketplace by imposing more restrictive rules on LECs than are imposed on cable companies or broadcast television companies.

IV. LOCAL EXCHANGE COMPANIES OFFERING VIDEO DIALTONE ARE NOT MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS UNDER THE 1992 CABLE ACT

The Commission, in the Video Dialtone Order, authorized local exchange companies to offer video dialtone in their telephone service areas.[18] Video dialtone, as defined in the Order, excludes a LEC from acting on its own to select, package and price video programming content.[19] Consequently, unless a LEC

[18] Video Dialtone Order at ¶ 2.

[19] See, id at ¶ 36.

provides video content it should not be considered a multichannel video programming distributor.

This interpretation is consistent with the statutory language defining a "multichannel video programming distributor." The 1992 Cable Act defines a "multichannel video programming distributor" as "a person such as ... but not limited to, a cable operator, ... who makes available for purchase, by subscribers or customers, multiple channels of video programming." A LEC offering video dialtone is not making "video programming" available for purchase by subscribers or customers. The LEC is simply acting as a carrier for programming offered by others, as contemplated by the Video Dialtone Order. The LEC does not -- it cannot -- sell content to subscribers.[20] The ability to own or control video programming content is the dispositive factor. Without this, LECs are not multichannel video programming distributors.

V. CONCLUSION

It is appropriate for the Commission to adopt rules that, during the transition to a competitive industry, will facilitate at least some competition in the cable television industry. The Commission, however, should continue to

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[20] Further, in order to come within the scope of the proposed rules, the video content must be content comparable to that offered by broadcast television stations in 1984. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) 47 U.S.C. Section 521-522 (16).

seek programming relief for LECs consistent with its recommendation to Congress that LECs be allowed to offer video content.[21]

Respectfully submitted,

Floyd S. Keene
Pamela J. Andrews
Attorneys for the
Ameritech Operating Companies
Room 4H74
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025
(708) 248-6082

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[21] Video Dialtone Order at ¶ 135.